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Rhetoric, Reality, and the Law of Unfunded Federal Mandates

by

Daniel H. Cole and Carol S. Comer

"Unfunded mandates" were a major issue in the 1994 congressional elections. In rhetoric reminiscent of Ronald Reagan's New Federalism, candidates around the country lashed out against the federal government's "undisciplined appetite" for regulating with "other governments' hard-earned money."¹ They brandished impressive-looking surveys and studies to support their claim that "unfair" federal regulatory "burdens" were driving states and cities toward "bankruptcy."² State and local leaders declared a National Unfunded Mandates Day, and they staged made-for-media protests to publicize the event.³ The press seized on the sound-bites, without bothering to explore the facts.

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Regardless of the constitutional or political propriety of federal mandates, there is no evidence that those mandates are imposing net costs on state and local governments.

Banner headlines proclaimed, "WASHINGTON BUCK-PASSING COSTING STATES, CITIES, TAXPAYERS DEARLY,"⁴ and "MODERN-DAY TAXATION WITHOUT REPRESENTATION."⁵ This combusive rhetoric fueled the emergence of the unfunded mandates issue as a national political priority, and it helped usher into Congress a new Republican majority with a "mandate" to curb mandates.

Immediately following the 1994 elections, then-Senate Majority Leader Bob Dole announced that the 104th Senate's first act would be "to relieve states

from unfunded federal mandates."⁶ Indeed, Senate Bill 1 was entitled the Unfunded Mandates Reform Act of 1995. Meanwhile, the Republican leadership in the House of Representatives severed the unfunded mandates issue from the Contract with America ("the Contract") in order to act on it even more quickly than the rest of the Contract.⁷ The 1995 Unfunded Mandates Reform Act (UMRA) became the second statute enacted by the 104th Congress. President Clinton signed it into law on March 22, 1995.⁸

Given the expedited treatment it received, the UMRA is surprisingly modest. The statute does not require the Congress to repeal, or even review, existing unfunded federal mandates.⁹ Nor does it prevent the

federal government from imposing new regulatory burdens on state and local governments. The statute does require Congress to quantify the costs to local and state governments of *some* new mandates it imposes; for many (but not all) intergovernmental mandates costing more than \$50 million, Congress must either identify a federal funding stream or approve the unfunded mandate in a separate, recorded vote.¹⁰ Administrative agencies also must prepare "regulatory impact statements" for proposed regulations that would impose costs of more than \$100 million in any one year on local governments *or* the private sector.¹¹ These provisions *could* reduce the number of unfunded federal mandates and enhance congressional oversight of agency decisionmaking. The result *could* be better, though not necessarily fewer, federal mandates to state and local governments.

If the federal government wants to issue new mandates, it will not have to look hard for funding streams. Ironically, state and city coffers are filled with federal funds that are, as yet, untied to specific federal mandates. But how can that be if, as the rhetoric maintains, federal unfunded mandates are bleeding cities and states dry? Simply put, the reality does not support the rhetoric. According to the best available numbers, total federal subsidies to local governments substantially exceed the total estimated costs of federal regulations.¹²

Recent articles have focused on the constitutional and policy implications of unfunded federal mandates.¹³ This article has a different goal: to expose a central myth behind the push for federal mandate relief. Regardless of the constitutional or political propriety of federal mandates, there is no evidence that those mandates are imposing net costs on state and local governments. On the contrary, federal subsidies to most cities and states, including block grants, categorical grants, and tax subsidies, more than compensate for the total estimated cost of federal mandates, funded as well as unfunded. In other words, the funding issue, which has been at the center of the federal mandates debate, is a red herring, and sweeping arguments about the fiscal unfairness of federal mandates are misguided. Critics of federal mandates must, instead, argue the messier political merits of specific federal requirements.

Section I of this article presents the rhetoric of unfunded mandates and subjects it to a reality check. One central premise of the mandates "problem"—that the federal government is imposing unfair costs on state and local governments—turns out to be a myth. Section I concludes with some implications of this analysis for federal policymakers and judges.

Section II examines the UMRA and its legislative history, and Section III reviews the Act's first year of implementation. Our final assessment of the UMRA is

positive, because it should: (1) improve the legislative process by increasing the information available to legislators about the costs of the intergovernmental mandates they enact, (2) enhance political accountability by requiring a separate vote for many new mandates, and (3) improve congressional oversight of administrative agency actions. We doubt, however, that the UMRA will have a significant, long-term affect on the number of new federal intergovernmental mandates. Nonetheless, state and local governments should be satisfied so long as the federal government provides them with a net subsidy.

I. THE RHETORIC AND THE REALITY OF UNFUNDED MANDATES

A. ORIGINS OF THE "PROBLEM"

The phrase "federal mandate" refers to a regulation or regulatory burden imposed by the federal government on a state or local government.¹⁴ The federal mandate "problem" actually encompasses several issues, including increasing federal "red tape," declining federal aid to states and municipalities, increasing state responsibility for federal regulatory programs, and the comparative political accountability of officials at various levels of government.¹⁵ Before Congress enacted the UMRA in 1995, the phrase "unfunded mandates" appeared in a number of different contexts,¹⁶ ranging from general issues of intergovernmental relations to the merits of specific federal regulations.¹⁷

Federal-state relations have always been contentious. Before the 1930s, those relations were based on constitutional delegation, premised on a system of dual federalism.¹⁸ During the New Deal era, federal-state relations became primarily a political (or fiscal), rather than a constitutional, issue. The federal government became more involved in state and local activities, but it was viewed more as a provider than a boss. Federal aid more than paid for the small number of local programs enacted as part of the Roosevelt Administration's New Deal,¹⁹ and local governments could devote surplus federal funds to local programs.²⁰

During the 1960s and 1970s, intergovernmental relations grew increasingly strained, as Congress enacted more than 500 new federal regulatory programs affecting state and local governments. Many of these programs promoted noble social goals, ranging from clean drinking water to freedom from racial discrimination, but they came with detailed rules, bureaucracies, and formulas for matching and distributing funds.²¹ Even more importantly, they came without direct federal funding; state and local administrative authorities had to pay the bulk of the costs out of their own budgets.

The strain on state and city coffers was offset,

however, by federal "General Revenue Sharing"—all-purpose grants with no conditions attached.²² During the 1970s, federal grants to state and local governments quadrupled.²³ By 1978, federal grants to cities equaled 26% of the revenue cities raised themselves and 70% of the revenue they received from their states.²⁴ Federal grants to eleven big cities, including Detroit, Phoenix, Los Angeles, Tulsa, Rochester, Chicago, Boston, St. Louis, Cleveland, Houston, and New York, averaged 43.3% of city tax revenues.²⁵ For some cities, including St. Louis, Newark, Buffalo, Cleveland, and Boston, federal aid averaged 57.3% of own-source revenues.²⁶ Most federal grants-in-aid at that time were in the form of "General Revenue Sharing." Thus, the federal funds were completely fungible.

The flow of federal dollars to state and local governments slowed when the Reagan Administration took office in 1980. Between 1978 and 1988, the federal contribution to state and city outlays fell to only eighteen percent.²⁷ These aid reductions came as the number of federally-imposed mandates continued to rise. As a result, the net federal subsidy to cities and states declined. But—this point is critical—it remained a net subsidy.

In addition, while the Reagan Administration did not curtail the imposition of new federal mandates, it reduced the burden for state and local governments (if only temporarily). First, it slowed the pace of new mandates, especially environmental mandates. Second, it effectively reduced the costs of *existing* federal mandates by relaxing federal oversight and enforcement. In the early 1980s, for example, Congress slashed the federal Environmental Protection Agency's budget by more than thirty percent (from \$1.4 billion in 1981 to \$975 million in 1983).²⁸ As a result, in 1983 the EPA was forced to reduce its staff of enforcement attorneys from 200 to only 30.²⁹ The Reagan EPA had little choice but to adopt voluntary compliance and the "nonconfrontational approach" as its official enforcement policies.³⁰

In the last years of the Reagan Administration, federal funding to state and local governments increased again, but not nearly to late-1970s levels, and it came with more strings attached. General Revenue Sharing was replaced by Categorical Grants and Block Grants, which provided less discretion to recipient governments. But the lost discretion was only marginal. The strings attached to Block Grants, in particular, tend to be quite loose.³¹ They are still substantially fungible in that they can offset own-source revenues dedicated to complying with federal mandates. Still, the marginal loss of discretion in the use of federal grant funds may be one factor driving current state and city complaints about federal mandates.

The phrase "unfunded mandates" first appeared in

the late 1970s, when the rate of increase in federal intergovernmental mandates began to outpace the rate of increase in federal grants to state and local governments.³² During the Reagan years, state and local governments had to bear more of the costs of the existing programs as well as new federally-mandated programs. This exacerbated existing fiscal pressures and generated political tension, giving impetus to the unfunded mandates debate. "Unfunded mandates" became a "shorthand phrase that sums up the tensions and grievances of the federal system characterized by deficits at the national level, and by budget shortfalls, increased taxes, and service cutbacks at the State and local levels."³³

In 1979 the Joint Economic Committee of Congress attempted, for the first time, to define and quantify the federal regulatory burden on state and local governments.³⁴ But like all subsequent studies of the unfunded mandates "problem," it failed to assess the total costs of federally-imposed mandates in light of federal intergovernmental grants and subsidies. As a result, the study provided no grounds for concluding that federal mandates were imposing net costs on state and local governments. The same was true of a 1980 study conducted by the Urban Institute that estimated the gross costs of six federal mandates on seven jurisdictions.³⁵ While the study derived a total per capita cost of \$25 (in 1978 dollars), the study's authors admitted that the costs of federal mandates varied drastically from one jurisdiction to another.³⁶ They also did not offset the costs of federal mandates against fungible grants-in-aid.³⁷ Nevertheless, these early studies elicited prompt, if weak, legislative responses.

In 1980, Congress enacted two laws, the Paperwork Reduction Act³⁸ and the Regulatory Flexibility Act,³⁹ which were designed not to prevent or reduce federal mandates, but to decrease compliance costs. A more significant law was enacted in 1981, entitled the State and Local Government Cost Estimate Act.⁴⁰ Like the 1995 UMRA, this statute required the Congressional Budget Office to prepare cost estimates for all federal mandates on state and local governments in pending legislation.⁴¹ However, unlike the 1995 UMRA, the 1981 Act did not erect any procedural hurdles to the enactment of new federal mandates.⁴² While it undoubtedly increased the information available to federal legislators about the costs of mandates they imposed on state and local governments, the 1981 State and Local Government Cost Estimate Act ultimately had no impact on the number of federal mandates. By the late 1980s, the unfunded mandates issue rose again to the fore of public policy debates, as new studies appeared to prove that proliferating federal mandates were pushing state and local governments toward bankruptcy.

B. PROVING A MYTH: SURVEYS AND STUDIES OF THE UNFUNDED MANDATES "PROBLEM"

In 1988, the City of Columbus, Ohio, issued the third major report on the unfunded mandates "problem."⁴³ This report gave new energy to the anti-mandate movement and sparked other local and state government studies. These studies, which received widespread media attention, provided much of the evidentiary basis for the Unfunded Mandates Reform Act of 1995. At first glance, the state and local government studies look impressive. They appear to show that unfunded federal mandates are unfairly taxing state and local resources. But appearances can be, and in this case are, deceiving. On a careful reading, the state and local government reports prove to be at best uninformative, and at worst misleading. Most significantly, not one of the reports examines whether the total costs of federal mandates exceed total federal subsidies to state and local governments. In the absence of that comparison, the studies and reports cannot possibly "prove" that the federal government is imposing "unfair" burdens on state and local governments and their taxpayers.

This subsection critically examines the largest and most significant of the state and local unfunded mandates studies, each of which suffers from significant flaws. We supplement the information they contain with Commerce Department and Office of Management and Budget (OMB) statistics on federal subsidies to state and local governments. The available numbers do not provide a complete picture of intergovernmental fiscal relations, but they do permit a rough comparison of the federally-provided subsidies and federally-imposed mandates (funded and unfunded). Federal grants-in-aid appear to substantially exceed the estimated costs of federal mandates, providing a net (after mandates) subsidy to state and local governments.

1. *The Ohio Studies*

The State of Ohio has been at the center of the unfunded mandates controversy since 1988, when its State and Local Government Commission conducted a survey entitled *An Overview of the Mandate Problem and Recommendations for Ohio*.⁴⁴ This report dealt mainly with state mandates to local governments, and it led to the enactment of state legislation regulating state-imposed unfunded mandates in May of 1994.⁴⁵ At about the same time, Ohio's governor issued an Executive Order to further control state mandates to local governments.⁴⁶ The Executive Order created a task force to study outdated and inappropriate state mandates and to assess the impact of proposed state agency rules on local governments.⁴⁷

The State and Local Government Commission of

Ohio issued a second report in 1994 that addressed both state and federal mandates.⁴⁸ The report identified seventy-six laws containing unfunded mandates, eleven of which were federal requirements that state regulators had passed through to local governments.⁴⁹ The report also contained a survey of county, township, and municipal officials to determine which federal mandates were the most burdensome to local governments. The survey results listed the federal mandates and the number of times each mandate was identified by surveyed officials.⁵⁰ Of twenty-two identified federal mandates, twelve were related to environmental protection.⁵¹ However, the survey did not require or even request local government officials to provide financial information to substantiate their claims about the burdens imposed by these "unfunded mandates." Consequently, the report provided no gross and net cost estimates for listed federal mandates.

The report did, however, quote from an earlier State of Ohio study that estimated that the total annual cost of unfunded federal mandates to the state exceeded \$300 million.⁵² Although this figure is almost certainly inflated,⁵³ it does provide a useful starting point for assessing the true "burden" of unfunded mandates on the State of Ohio. However, cost estimates tell only half the story. In order to accurately assess the burden of federal mandates, we also need to know how much federal funding the state received. There are many ways to fund a mandate. Even without direct funding, a mandate might be funded indirectly, for instance, by discretionary federal grants-in-aid.⁵⁴

According to the U.S. Department of Commerce, in 1994 the State of Ohio received approximately \$8.4 billion in federal grants, more than \$3 billion of which were discretionary.⁵⁵ Apparently the State of Ohio received ten times more federal discretionary dollars than it was required to spend on all "unfunded" federal mandates, since the state's own estimates show federal mandates cost only \$300 million.⁵⁶ This figure may be misleading, however, because discretionary dollars (since the demise of General Revenue Sharing) always come with strings attached; they cannot offset federal mandate costs dollar-for-dollar. A more accurate computation would require a more complete cost estimate of mandate costs, available funds, and restrictions on fund uses. The *net* burden or benefit imposed on the State of Ohio by the federal government is the total cost of federal mandates, both funded and unfunded, minus total federal subsidies received, including grants and tax subsidies. But the Ohio studies do not provide the information necessary to compute the net burden (or benefit). The numbers they do provide only permit us to conclude that in 1994 Ohio received from the federal government \$8.1 billion *more*

than it was forced to spend on unfunded federal mandates.

2. *The Chicago Study*

In 1992, the City of Chicago and the Roosevelt University Institute for Metropolitan Affairs prepared another report on unfunded mandates.⁵⁷ This sheds more light on the issues than the Ohio studies because it includes more detailed financial information that, on close examination, appears to contradict the City's contentions about the "burdens" of unfunded federal mandates. What remains, in the end, is only bald rhetoric about federalism and "the direct connection between the individual citizen and his or her government that the American federal system was created to enhance."⁵⁸

The Chicago report claims that federal mandates consume local tax revenues: "[L]ocal governments and taxpayers are now dipping well into local revenue sources to foot the bill for federal programs."⁵⁹ But the financial data provided in the report belie this contention. The Chicago report estimates that "unfunded mandates and burdensome regulations cost . . . a conservatively-estimated \$160 million."⁶⁰ But the report also reveals that the federal government contributes \$519 million each year to the City's budget.⁶¹ Accepting both numbers at face value, Chicago apparently receives over three times more money from the federal government than it is forced to spend on "unfunded mandates and burdensome regulations."

3. *The Tennessee Study*

The State of Tennessee issued a report in 1995 that yielded findings similar to those of the Chicago Study.⁶² The study estimated that federal mandates (funded and unfunded)⁶³ cost the state \$244.2 million in budget year 1995-96. But the study also reported that federal aid to Tennessee was expected to total \$4.08 billion dollars.⁶⁴ Not all of this federal aid is discretionary, of course, but a sizable chunk of it is. In 1994, for example, thirty-nine percent of the \$3.9 billion in federal grants Tennessee received—\$1.5 billion—was discretionary.⁶⁵ That is more than six times the estimated total cost of federal mandates in Tennessee's 1995-96 budget year. Of course, comparing federal discretionary funds to mandate costs is meaningful only if discretionary funds are somehow fungible for mandate purposes. Later in this section, we will see that they are substantially fungible.

4. *The U.S. Conference of Mayors/Price Waterhouse Study*

In 1992 and 1993, the U.S. Conference of Mayors surveyed 314 local governments about unfunded federal

mandates and hired the accounting firm of Price Waterhouse to tabulate the results. It was the largest survey to date of unfunded federal mandate costs, and its findings, published in October 1993, appear impressive.⁶⁶ According to Price Waterhouse's computations, the ten most expensive federal unfunded mandates cost American cities \$6.5 billion in 1993.⁶⁷ This total estimate is the sum of estimates provided by the 314 cities that participated in the survey. However, while the data seem striking, they have little utility because of numerous and substantial methodological flaws in the survey.

The U.S. Conference of Mayors/Price Waterhouse study attempts to derive generally applicable inferences based on survey data obtained from a sample. Inferential statistics rely on mathematical theories of probability to make generalizations about populations based on data from samples.⁶⁸ In order to draw the desired inference with a high degree of accuracy, the sample must be representative of the whole population, and the data must be accurate.⁶⁹ This process can yield highly accurate inferences if it is done properly. However, the inferences drawn from the U.S. Conference of Mayors/Price Waterhouse study are not reliable, because the process was flawed.

The U.S. Conference of Mayors/Price Waterhouse study attempts to infer a total cost estimate of unfunded federal mandates for all U.S. cities from a sizable sample of 314 cities. But the sample is not representative of all U.S. cities. Smaller cities (defined by the survey as those with fewer than 30,000 inhabitants) are under-represented in the data pool because they responded to the survey less frequently than larger cities.⁷⁰ In addition, the study fails to reveal whether the sample includes every city that responded to the survey or a select group of respondents. While the survey's size is respectable, its representativeness is questionable.

The survey data are also questionable. The U.S. Conference of Mayors/Price Waterhouse study claims that survey data were verified (without explaining how),⁷¹ but subsequent independent assessments have turned up numerous significant discrepancies. For example, the U.S. Conference of Mayors/Price Waterhouse study claims that 234 of the 314 surveyed cities incurred costs under the Endangered Species Act (ESA).⁷² This figure made the Environmental Defense Fund (EDF) suspicious because there are no known endangered species in or around many of those cities. To test the data, EDF solicited copies of survey responses directly from participating cities. Of the eight cities that provided their survey responses to the EDF, only one reported ESA-related costs. But the U.S. Conference of Mayors/Price Waterhouse study listed all eight as having reported costs under ESA mandates. The staff of the Senate

Environment and Public Works Committee discovered other discrepancies.⁷³ They found that the study mistakenly listed at least two cities (Norman, Oklahoma and Jackson, Mississippi) as having incurred costs under legislation including the Clean Air Act, the Clean Water Act, the Endangered Species Act, and the Fair Labor Standards Act.⁷⁴

These discrepancies alone refute the claim that the U.S. Conference of Mayors and Price Waterhouse verified the data contained in the study. Moreover, it would have been impossible to verify much of the data in the study because the study did not require respondents to identify information sources or to supply supporting records.⁷⁵ When the staff of the Senate Environment and Public Works Committee interviewed survey respondents, only twenty-two percent of them "could provide documents to verify the cost estimates they provided to Price Waterhouse."⁷⁶

Even if all the survey data had been both verifiable and actually verified, the figures extrapolated from that data still would not provide a true picture of the costs of federal mandates. The chosen extrapolation method does not "adjust for significant confounding factors,"⁷⁷ such as cost differentials resulting from, among other causes, variations in local pollution levels. Compliance costs under the Clean Air Act, for example, are determined largely by local pollution levels. According to the Staff Report of the Senate Environment and Public Works Committee, the City of New York, which was included in the survey, led the nation in 1992 with 304 moderate air pollution days.⁷⁸ Meanwhile, Honolulu, which was not included in the survey, had only three moderate air pollution days.⁷⁹ Yet, "using Price Waterhouse's method of extrapolation, costs attributable to cities with heavily-polluted air, such as New York and Los Angeles, would influence the extrapolation of costs to an overall population including Honolulu, which has virtually no air pollution."⁸⁰ Similarly, the costs of complying with water supply mandates in Philadelphia, "which has the nation's worst record for violations of the Safe Drinking Water Act and the highest annual number of people exposed to dangerous contaminants," would be used to project compliance costs for other cities not included in the survey, such as Minneapolis, which has "no drinking water violations."⁸¹

The U.S. Conference of Mayors/Price Waterhouse study also fails to offset mandate cost estimates against federal and state aid received, representing yet another methodological flaw. In addition, the study fails to consider that some of the costs cities incurred in complying with federal mandates would have been incurred even in the absence of those mandates. Thus, the U.S. Conference of Mayors/Price Waterhouse study fails

to present an accurate portrayal of the unfunded federal mandates "problem." According to Senators John Chafee (R-R.I.) and Max Baucus (D-Mont.), respectively the majority and minority leaders on the Senate Environment and Public Works Committee, the study is "more accurately seen as a review of total compliance costs for federal, state, and local requirements."⁸²

C. ACCURATELY ASSESSING THE COSTS AND BENEFITS OF FEDERAL MANDATES AND GRANTS

The U.S. Conference of Mayors/Price Waterhouse study sheds no real light on the unfunded mandates "problem." Merely reporting the estimated costs of admittedly expensive federal programs is inflammatory—expenses appear magnified when isolated from overall state and city budgets. Indeed, the state and local studies of unfunded federal mandates reviewed here all misportray the costs of federal mandates in precisely the same ways: They estimate the *gross* costs of federal mandates, but not the *net* costs after offsetting for: (1) state and local fiscal benefits resulting from federal mandates, (2) federal grants and other subsidies, or (3) the regulatory costs that would be incurred even in the absence of federal mandates.

A recent Congressional Budget Office (CBO) report illustrates how federal mandate cost estimates are inflated. The report examines state and local government cost estimates of the federal Safe Drinking Water Act⁸³ and finds that the estimates are exaggerated primarily because they fail to take into account the costs that state and local governments would incur even in the absence of the federal mandates.⁸⁴ The CBO rationally assumes that local governments would take *some* steps to protect drinking water supplies in the absence of federal regulations. The *true* cost, then, of federal mandates under the Safe Drinking Water Act is the incremental cost of federally-required water protection activities, that is, the costs of federal requirements above those costs local governments would incur anyway.⁸⁵ The CBO did not even hazard a guess at that number, which must, after all, be very difficult to measure. That does not mean, however, it should be ignored. It is important to recognize, at least, that cost estimates of federal mandates are inflated unless they are offset by the costs that state and local governments would incur even in the absence of federal mandates.⁸⁶

In addition to inflating the costs of federal mandates, the various state and local government studies all fail to offset costs against the federal grant revenues and subsidies they receive. As we saw in our review of various state and local government studies, the total level of federal spending appears to exceed the total costs of federally-imposed mandates.⁸⁷ National figures confirm

this. The Chicago report quotes a Heritage Foundation analyst who estimates the total annual cost to all states of all federal mandates at \$75 billion a year.⁸⁸ Not all of those mandates are unfunded, of course.⁸⁹ But even if they were, the states still would be receiving a substantial net subsidy from the federal government. According to the Commerce Department, the federal government in 1994 provided a total of \$210 billion in annual state aid, \$90 billion of which was discretionary.⁹⁰ That leaves states with a potential net (after federal mandate expenses) surplus of \$15 billion or more in discretionary federal grants.

As previously noted, federal block grants and other discretionary funds are not wholly fungible—they come with certain strings attached and, therefore, do not provide a dollar-for-dollar offset for federal mandates—but they are *substantially* fungible. As David Hyman has written:

The distinction between restricted and unrestricted grants is somewhat artificial because of the fungibility of money, which means the money can be used for more than one purpose. A grant, with or without restrictions on the use of funds, frees local tax monies that otherwise would be spent on government-provided services. The receipt of the grant could allow tax reductions that benefit citizens of recipient communities. If taxes are reduced as a result of the grant, citizens can increase their consumption of private goods and services beyond the amounts that would be possible if they had to finance all government-supplied goods and services through locally raised tax revenue. In other words, the funds may end up being used for any purpose, even though they were intended for a specific use.⁹¹

This is especially true where federal grants, even with conditions attached, pay for state and local priorities, such as law enforcement or community development. And, to the extent that all federal grant monies *are* fungible, they should be factored into federal mandate cost assessments. This may be difficult, as fungibility varies substantially from one federal program to the next, depending on the conditions imposed on grant funds. It might be useful to compare total federal subsidies with total federal regulatory requirements as percentages of city budgets. But first we would need clear definitions of “federally induced costs”⁹² and federally-provided benefits, and someone would have to actually collect the data.

Without vouching for their accuracy, we can use currently available estimates of costs and benefits to concoct a rough comparison of federally-induced costs and federally-provided benefits. Starting with federally-imposed costs, the U.S. Conference of Mayors/Price Waterhouse study estimated that federal mandates consumed on average 11.7% of city budgets in fiscal year 1993.⁹³ How does that compare with federally-provided benefits? Despite the 28% decline in federal funding between 1981 and 1990, federal dollars still comprised an estimated 14.3% of local government revenues in 1991.⁹⁴ This leaves a 2.6% net subsidy. In fact, the net subsidy is probably higher than that because, between 1991 and 1993, federal grants to state and local governments increased by 26%, from \$152 to \$206.4 billion.⁹⁵

The net federal subsidy grows even larger if we incorporate other federal intergovernmental subsidies besides direct grants-in-aid. For example, section 103(a) of the Internal Revenue Code exempts state and local bond issues from federal taxation, effectively permitting state and local governments to borrow at below-market interest rates.⁹⁶ In fiscal year 1995, the section 103(a) exemption cost the federal government an estimated \$12.35 billion in lost revenue.⁹⁷ This is not a federal grant-in-aid, but it boils down to much the same thing; it is a \$12.35 billion federal transfer to states and cities with no strings attached. This single tax subsidy covers one-sixth of the total estimated costs of federal mandates imposed on state and local governments (\$75 billion).⁹⁸ State and local governments also benefit indirectly from section 164(a) of the Internal Revenue Code,⁹⁹ which allows taxpayers to deduct state and local tax payments from income subject to federal taxation. While this benefit accrues directly to taxpayers, it indirectly subsidizes higher marginal state and local tax rates. According to James St. George of the Brookings Institution, “Washington in effect pays 40 percent of state and local income and property taxes for the highest-income taxpayers and lower shares for other taxpayers.”¹⁰⁰ Deductions of state and local tax payments, together with exemptions for interest earnings on state and local debts, cost the federal government an estimated \$66 billion in fiscal year 1994.¹⁰¹ And they are only two of many indirect federal subsidies to state and local governments.

None of this proves, of course, that the federal government provides net subsidies to each state and city. As already noted, the available numbers are incomplete and questionable, and even the concepts of *federally-induced costs* and *federally-provided benefits* are ambiguous. In addition, we have been dealing only with *average* costs and benefits using numbers for big cities; the fiscal circumstances of individual cities, especially

smaller towns, vary greatly. Nevertheless, the available numbers lean strongly in the direction of an average net federal subsidy; the total amount of federal monies flowing to states and cities appears to substantially exceed the total amount of monies state and cities are forced to spend on federal priorities. At the very least, the numbers do *not* support the contention that the federal government is imposing net costs on state and (most) local governments. What is the basis, then, for concluding that unfunded federal mandates are imposing "unfair" burdens on state and local governments?

Finally, all of the surveys and studies discussed in this section are premised on the debatable notion that the federal government *should* pay for each and every regulatory requirement it imposes on state and local governments. As noted earlier,¹⁰² normative issues in the unfunded mandates debate are beyond the scope of this article. But it is worth noting that there are legitimate economic, political, and legal grounds for arguing that local governments (and, through them, local taxpayers) *should* bear at least some of the costs of complying with certain federal environmental, civil rights, and health and safety regulations.¹⁰³

D. SUMMATION AND IMPLICATIONS

State and local government officials have complained continuously and vociferously that they are the victims of an elaborate scam by the federal government. By imposing unfunded mandates on cities and states, they claim, the feds are receiving credit for admittedly worthwhile programs, while evading the political fallout for the tax hikes those programs demand.¹⁰⁴ In this section, we have subjected the rhetoric about the unfunded mandates "problem" to a reality check which belies the central claim that unfunded federal mandates are unfairly burdening state and local governments. The available numbers simply do not support the claim that federal mandates are bankrupting city budgets and causing local taxpayers to bear the fiscal burden of federal programs.

The various local and state government studies and surveys of the unfunded mandates "problem" reviewed in this section fail to show anything more than that the escalating costs of federal mandates are leaving state and local governments with smaller net federal subsidies. The costs of federal programs have escalated in recent years, while federal grants-in-aid (until about 1988) declined.¹⁰⁵ But the available numbers suggest that the federal government has continued to provide a substantial *net* subsidy to state and local governments. The proliferation of unfunded federal mandates has reduced, but not reversed that subsidy.

State and local governments complain that they have

had to raise taxes to meet the increased federal mandate compliance costs, but their studies have failed to provide evidence linking local tax increases to federal mandates. Furthermore, given the evidence of a continuing net federal subsidy to state and local governments, it is doubtful that any such links exist. State and local governments may have had to raise taxes to make up for reductions in their net federal subsidies (resulting from increasing federal mandates and declining federal grants), but to the extent they still receive a net federal subsidy, state and local governments cannot genuinely blame local tax increases on federal mandates. On the contrary, national taxpayers have been bearing the excess costs of city programs via direct federal grants or indirect federal subsidies. State and local government officials might in fact be doing exactly what they accused federal legislators of doing: unfairly passing off responsibility for raising taxes. Political commentaries note that this would not be the first time that state and local governments have attempted to "blame their financial troubles on the aggressiveness of higher governmental authority. . . . Scapegoats are essential in politics, and the national government is always a choice target."¹⁰⁶ From this perspective, state and local complaints about unfunded federal mandates may be seen simply as part and parcel of "the politics of getting."¹⁰⁷

All this, admittedly, has little bearing on normative arguments about the propriety of unfunded federal mandates, but it does present the mandates issue in a very different light. At the very least it suggests that the funding issue should not be at the heart of any debate about federal mandates.

Our analysis in this section also has implications for the courts, where the unfunded mandates issue has emerged in recent cases concerning intergovernmental relations. In *Printz v. United States*,¹⁰⁸ for example, a federal district court in Montana struck down a provision of the Brady Handgun Violence Prevention Act¹⁰⁹ that required local law enforcement officers to perform background checks to determine individuals' eligibility to purchase handguns. In an opinion authored by Judge Charles Lovell, the court held that the "ascertainment/background check provision of the Act exceeds the powers delegated to Congress and violates the Tenth Amendment of the Constitution because it substantially commandeers state executive officers and indirectly commandeers the legislative processes of the state to administer a federal program."¹¹⁰ The court's rationale focused heavily on the fact that Brady Act mandates were unfunded:

More important, both CLEOs (chief law enforcement officers) and state and local

elected bodies are indirectly required to allocate their resources to implement the Act instead of using those resources to address problems important to their constituents

....

In addition, state and local governments are also held accountable for the Act by being conscripted into bearing the financial burden for administering the Act, lessening their ability to provide other services to their citizens and leading to the appearance of inefficiency.¹¹¹

The court did not support these assertions with any evidence of the costs to local law enforcement agencies of Brady Act compliance. Neither did the court mention offsetting federal grants-in-aid for state and local law enforcement.¹¹² The district court in *Printz* swallowed whole the rhetoric of the unfunded mandates "problem" without bothering to examine its factual basis. The court's carelessness was especially regrettable because its comments about federal funding for the Brady Act mandate were not necessary to its decision on the constitutional issues at bar, which concerned the limits of federal authority over state and local administrators. Indeed, in *Mack v. United States*,¹¹³ another federal district court managed to hold the same provisions of the Brady Act unconstitutional without resorting to unsubstantiated rhetoric about unfunded federal mandates.

The unfunded mandate rhetoric accompanied the *Mack* and *Printz* rulings on their consolidated appeal to the Ninth Circuit.¹¹⁴ Although Judge Canby's majority opinion for the appellate panel did not mention cost issues in Brady Act compliance, Judge Fernandez's dissenting opinion did, noting that state officials were being "ordered to become part of a federal gun control program at the state's own expense."¹¹⁵ Finally, *Printz v. United States* brought the unfunded mandates issue all the way to the U.S. Supreme Court. During oral arguments on December 3, 1996, Justice Scalia stated, "[i]t's easy to impose an obligation on the states and then let them take the heat for raising taxes."¹¹⁶ This comment from a member of the country's highest court indicates just how pervasive and influential the unsubstantiated rhetoric of unfunded mandates has become.

II. FROM CAMPAIGN RHETORIC TO LAW: THE UNFUNDED MANDATES REFORM ACT OF 1995

The preceding section illustrated that the unfunded

mandates "problem" is based, in large part, on a mythical picture of the federal government as a voracious and uncontrollable monster consuming state and local budget revenues. When it comes to legislation, however, persuasive myths can be every bit as important as facts.

In the UMRA, Congress responded to the rhetoric but never lost sight of the reality that state and local governments receive a net federal subsidy. This is clear from the Senate "findings" codified in section 106 of the Act. Section 106(a)(1) provides that "the Congress should be concerned about shifting costs from Federal to State and local authorities and should be equally concerned about the growing tendency of States to shift costs to local governments."¹¹⁷ While this acknowledges an unfunded mandates "problem," it reflects the reality of a declining net federal subsidy to state and local governments. More revealing is the Senate's second finding in section 106(a)(2) of the Act: "cost shifting from States to local governments has, in many instances, forced local governments to raise property taxes or curtail sometimes essential services."¹¹⁸ Notice that this finding expressly blames unfunded *state* mandates, but *not* unfunded *federal* mandates, for local tax increases. The lack of parallel construction in sections 106(a)(1) and 106(a)(2) implies that the Senate was aware that *federal* mandates have not been responsible for driving up state and local taxes. If this implication is correct,¹¹⁹ the Senate must have found its legislative task tricky. It had to respond (or, at least, appear to respond) to the *perceived* "problem" of unfunded federal mandates without denying the reality of a net federal subsidy to state and local governments. Whether or not this was a conscious effort, the structure of the UMRA seems to reflect Congress's effort to walk a tightrope between perception and reality.

The UMRA's express purpose is "to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal governmental priorities."¹²⁰ A Report of the House Committee on Government Reform and Oversight explained that the goal was to "ensur[e] that Congress and the Executive Branch know and consider the impact of legislative and regulatory proposals before acting on these proposals."¹²¹ These statements of purpose are fully consistent with the UMRA's substantive and procedural contents.

The UMRA is divided into four titles. Title I addresses legislative proposals that would impose mandates on state and local governments. Title II imposes procedural requirements on federal agency rulemaking. Title III permits Congress to review existing federal statutes and regulations that impose regulatory

burdens on state and local governments. And Title IV limits judicial review of congressional and federal agency actions, so that litigation does not delay important federal actions.

A. POINTS OF ORDER AND OTHER PROCEDURAL REQUIREMENTS FOR UNFUNDED MANDATES IN PROPOSED LEGISLATION

Title I of the UMRA requires that congressional committee reports on legislative proposals include information concerning whether those proposals would impose new federal mandates on state and local governments *or* on the private sector.¹²² The reports must include all direct costs stemming from the federal mandate, as well as any adverse impacts the mandate might have on the competitive balance between the private and public sectors. For legislative proposals that impose mandates on state or local governments, committee reports must provide additional funding information. If the intergovernmental mandate will be federally funded, the report must include information concerning appropriations and how funding will be allocated. If the mandate will not be fully funded, the committee must fully explain why not and to what extent.¹²³

In order to assist congressional committees in fulfilling these responsibilities, the UMRA requires the Congressional Budget Office to estimate the direct costs of intergovernmental mandates. If a legislative proposal would impose direct costs exceeding \$50 million, the CBO Director must submit, to the responsible committee, an estimate of the costs of complying with the mandate and the amount of new budget authority necessary to cover those costs. The Director also must prepare cost estimates for some private sector mandates. If a legislative proposal would impose mandates on the private sector in excess of \$100 million, the Director must estimate the costs of private sector compliance as well as increases in federal financial assistance needed to fund private sector compliance.¹²⁴

If a bill comes to the floor containing an intergovernmental mandate estimated to cost more than \$50 million, it is considered not "in order," which means that any legislator can object to it by raising a point-of-order with the Chair.¹²⁵ When a point-of-order is raised, the mandate is automatically stricken from the bill unless a majority votes to waive the point-of-order.¹²⁶ A vote to waive the point-of-order operates as an express approval of the unfunded mandate. It is important to note, however, that the UMRA does not require any member to raise a point-of-order against an unfunded mandate. If no point-of-order is raised, the unfunded mandate can be enacted into law without a separate vote. It is doubtful,

however, that any substantial unfunded mandate would make it through Congress without at least one senator or representative raising a point-of-order. If that did happen, the likely implication would not be that UMRA procedures had broken down, but that there was unanimous support in Congress for the new mandate. In short, the UMRA does not prohibit Congress from enacting new unfunded mandates; it merely provides procedural mechanisms to ensure informed decisionmaking and enhance political accountability.

It is also important to remember that not every unfunded mandate is subject to the UMRA's special procedural rules. In addition to mandates costing under \$50 million, Congress expressly excluded seven categories of mandates from the UMRA. These include mandates that: (1) enforce constitutional rights; (2) establish or enforce rights against discrimination; (3) require compliance with accounting and auditing procedures for federal grants; (4) provide emergency assistance to state, local, or tribal governments; (5) pertain to social security programs; (6) relate to national security; or (7) are required to fulfill international treaty obligations.¹²⁷ The President also may designate "emergency legislation" to avoid the UMRA's procedural rules.¹²⁸

B. NEW AGENCY RULEMAKING PROCEDURES

Title II of the UMRA amends agency rulemaking procedures to require administrators to assess the impacts of proposed regulations on state, local, and tribal governments.¹²⁹ Federal agencies must prepare regulatory impact statements for all proposed rules that might cost local governments or the private sector \$100 million or more (in the aggregate) in any one year.¹³⁰ The statement must identify the federal law under which the rule is being promulgated,¹³¹ and it must be included in the general notice of the proposed or final rulemaking.¹³² The statement must include a cost-benefit analysis and an estimate of compliance costs. The cost-benefit analysis quantifies the costs and benefits of the federal mandate to the private sector or to state, local or tribal governments, as well as the effects of the mandate on public health, safety and the environment. The cost estimates are to include future compliance costs, disproportionate budgetary effects, and the effects of the mandate on the national economy.¹³³ Cost-benefit analyses also are to assess the extent to which federal resources are available to carry out mandates.¹³⁴

In addition, when an agency proposes a new mandate that would require a regulatory impact statement, it must identify and consider alternatives to the proposed regulation. The agency then must select "the least costly, most cost-effective or least burdensome alternative that

achieves the objectives of the rule," unless that alternative is inconsistent with the law or the administrator publishes (with the rule) an explanation of why that alternative is inappropriate.¹³⁵

C. ADMINISTRATIVE REVIEW OF EXISTING FEDERAL MANDATES

Title III of the UMRA requires the Advisory Commission on Intergovernmental Relations (ACIR) to study "issues involved in calculating the total costs and benefits to State, local and tribal governments of compliance with Federal law."¹³⁶ The ACIR is to investigate and recommend to Congress means for: (1) providing governments with more flexibility in complying with mandates, (2) reconciling conflicting or inconsistent mandates, (3) terminating duplicative or obsolete mandates, (4) temporarily suspending non-vital mandates in order to relieve local governments' fiscal straits, and (5) establishing common definitions and compliance standards.¹³⁷ The ACIR should recommend mandates for legislative review and identify ways to mitigate any negative impacts that relief from intergovernmental mandates might have on the private sector.¹³⁸ The UMRA also charges the ACIR to monitor federal court decisions imposing responsibilities on state, local, or tribal governments beyond those imposed by federal laws and regulations.¹³⁹

D. JUDICIAL REVIEW UNDER THE UMRA

In the final title of the Act, Congress strictly limits judicial review. Plaintiffs can sue under the UMRA only when agencies fail to prepare a regulatory-impact statement as required by section 202.¹⁴⁰ Even failure to prepare a statement does not give cause to stay, enjoin or invalidate the agency rule.¹⁴¹ Judicial review is not available to enforce compliance with any other substantive or procedural provision of the UMRA.¹⁴²

E. INITIAL ASSESSMENTS OF THE UMRA

Responses to the UMRA have been mixed. Some consider the law a well-balanced solution to the unfunded mandates problem.¹⁴³ Others argue, to the contrary, that it is completely unresponsive to the problem; they view the UMRA as a mere "placebo" which, at best, should do no harm.¹⁴⁴ More hostile critics have referred to the UMRA as a "toothless" "hoax" that does not even deserve to be called a "law."¹⁴⁵ Most interestingly of all, many state and local officials who pushed the hardest for unfunded mandates reform have been virtually silent on the UMRA. To the extent they have discussed it at all, they have referred to the statute as a "first step," suggesting that they believe it does not completely resolve the unfunded mandates "problem."¹⁴⁶ The UMRA's first year of

implementation has, to varying extents, borne out each of these disparate viewpoints.

III. IMPLEMENTING THE UMRA: YEAR ONE

A. THE CONGRESSIONAL BUDGET OFFICE GEARS UP TO ASSESS NEW FEDERAL MANDATES

The UMRA generated a great deal of activity in the Washington Beltway even before it took effect on January 1, 1996. In particular, the CBO and the ACIR were busy complying or preparing to comply with their statutory obligations under the Act.

The CBO's charge is to identify and calculate the costs of new mandates in proposed legislation and regulations. This task is pivotal, as CBO estimates alone determine whether a given proposal is subject to the UMRA's point-of-order vote. It is also a job that taxes CBO resources. In an appearance before the Senate Appropriations Committee in May 1996, CBO Director June E. O'Neill estimated that the Agency's added burdens under the UMRA would amount to \$2.178 million and twenty-four staff-years in 1996 alone, based on an expected workload of 550 bills to assess for mandate costs.¹⁴⁷ These figures confirm that while increasing the financial information for congressional policymaking is a laudable goal, it is certainly not cheap.

In order to handle the expected influx of legislative and administrative proposals for mandate cost estimates, the CBO established a new State and Local Government Cost Estimates Unit (SLGCEU) within its Budget Analysis Division. The SLGCEU provides cost estimates and conducts "special studies relating to intergovernmental mandates and their budgetary impacts"¹⁴⁸ in order to improve the accuracy of mandate cost accounting. In July 1995, representatives of the CBO asked members of the National Conference of State Legislatures for assistance in collecting "more and better information on the costs of its mandates."¹⁴⁹ This may have reflected, in part, the CBO's dissatisfaction with existing state and local studies of federal unfunded mandates, but it primarily demonstrated the CBO's desire to improve its own cost estimations. Specifically, the CBO wanted assistance in defining and isolating state and local governments' incremental mandate compliance costs (a problem identified in the CBO's study of federal mandates under the Safe Drinking Water Act).¹⁵⁰ The CBO also wanted help to overcome the difficulties of extrapolating and generalizing cost estimates across states.¹⁵¹ Five full-time CBO staff members assigned to the SLGCEU perform mandate cost estimates and special studies.¹⁵² In the first half of 1996 alone, the unit examined nearly 400 bills for intergovernmental and private sector mandates.¹⁵³

B. THE ADVISORY COMMISSION ON INTERGOVERNMENT RELATIONS REVIEWS EXISTING MANDATES

While the CBO geared up to perform its vital function under the URMA, the ACIR was already completing its initial review of existing federal mandates, as required under Title III of the Act. The twenty-two member Commission,¹⁵⁴ comprised of state governors, federal, state, and local legislators, and administration officials, released its preliminary report and recommendations on January 24, 1996.¹⁵⁵ The report estimated that state and local governments are subject to approximately 200 mandates under 170 federal laws. Of those 200 mandates, the ACIR selected the fourteen "most troublesome" for review. Based on that review, the ACIR recommended permanently repealing intergovernmental mandates contained in seven federal laws: the Fair Labor Standards Act,¹⁵⁶ the Family and Medical Leave Act,¹⁵⁷ the Occupational Safety and Health Act (OSHA),¹⁵⁸ drug and alcohol testing of commercial drivers,¹⁵⁹ metric conversion for plans and specifications,¹⁶⁰ the Boren Amendment to Medicaid,¹⁶¹ and required use of recycled crumb rubber in asphalt paving.¹⁶² None of these federal mandates, according to the ACIR, have "sufficient national interest to justify intruding on state and local government abilities to control their own affairs."¹⁶³

By contrast, the ACIR found sufficient national interest to justify federal mandates under the Clean Water Act,¹⁶⁴ the Individuals with Disabilities Education Act,¹⁶⁵ and the Americans with Disabilities Act.¹⁶⁶ Nevertheless, the ACIR recommended that the federal government either pick up more of the tab for state and local implementation of these statutes or relax stringent requirements and deadlines for state and local compliance with their mandates.¹⁶⁷ The remaining group of mandates, under the Safe Drinking Water Act,¹⁶⁸ the Endangered Species Act,¹⁶⁹ the Clean Air Act,¹⁷⁰ and Acts that condition federal grants-in-aid on compliance with the Davis-Bacon Act,¹⁷¹ were sufficiently justified by the national interest, according to the ACIR, but the ACIR recommended revising them to provide state and local governments with "greater flexibility and increased consultation."¹⁷² In addition to these general recommendations, the ACIR provided more specific and detailed recommendations concerning each of the federal laws reviewed. For example, the Commission recommended that the federal government return to state and local governments "full responsibility for safe drinking water standards."¹⁷³

C. CRITICISM OF THE ACIR REVIEW

At a news conference announcing the report and

recommendations, ACIR members invoked familiar refrains about the federal government's propensity for enacting noble goals while sticking state and local taxpayers with the costs. As Representative Thomas M. Davis III (R-Va.) put it, "Congress passed the bill, then passed the buck to state and local governments."¹⁷⁴ Such inflammatory rhetoric created an impression that the ACIR (despite its bipartisan composition) and its review process were ideologically and politically biased.¹⁷⁵

A report by Citizens for Sensible Safeguards (CSS), a coalition of 150 labor, civil rights, community, and environmental groups,¹⁷⁶ alleged that the ACIR's report and recommendations were based on exaggerated costs, understated benefits, and extensive methodological flaws.¹⁷⁷ For example, in reviewing OSHA, the ACIR neglected to consider the extensive fiscal benefits of extending OSHA coverage to all public and private employees. According to the CSS, state and local governments would save an estimated \$600 million annually in reduced medical and workers' compensation costs by complying with OSHA mandates.¹⁷⁸ Similarly, in its review of the Family and Medical Leave Act, the ACIR failed to consider existing empirical research that derived lower net cost estimates.¹⁷⁹ Part of the ACIR's problem, according to the CSS, was logistical: "How [could] a staff of three [researchers] explore 200 proposed mandates, select 14, and publish a set of well-researched and coherent suggestions in less than one year?"¹⁸⁰ In addition, the CSS noted that the ACIR's review process was closed—the group held no public meetings—and its voting procedures were suspect.¹⁸¹ ACIR meetings were plagued by absenteeism, and only seven ACIR members, less than a quorum, were present at the December 19th meeting to vote on the report and recommendations. Other members of the ACIR were later balloted, but the exact purpose of the vote was not clear. At the December 19th meeting, ACIR Executive Director William Davis announced that, "the decisions [the Commission] make[s] today are really on what it is that [the Commission] want[s] to expose for public comment over the next three months."¹⁸² According to the CSS, "[c]ommissioners never voted on the substance of the report. Rather, they merely assented to have it published in the *Federal Register* for comment."¹⁸³ This view was confirmed by at least one member of the ACIR, Congressman Donald Payne (D-N.J.), who complained that Commission members were "not clear on exactly what they were voting on."¹⁸⁴

Even after the ACIR released its preliminary report and recommendations, it tried to subvert legally-required administrative procedures. The UMRA directed the Commission to hold "public hearings."¹⁸⁵ The ACIR initially scheduled a single for-profit "conference" for

which it planned to charge participants \$400 each.¹⁸⁶ This effort was scuttled after public interest groups complained. The ACIR then tentatively scheduled a free public hearing, but provided only twelve days advance notice in the *Federal Register*.¹⁸⁷ That hearing was later postponed indefinitely.¹⁸⁸

The ACIR's recommendations also can be criticized for exceeding the UMRA's mandate. As described in section II of this article, Congress specified that the ACIR was to base its review of existing mandates on five factors: (1) providing state and local governments with more flexibility in complying with federal mandates; (2) reconciling conflicting or inconsistent mandates; (3) terminating duplicative or obsolete mandates; (4) temporarily suspending non-vital mandates in order to relieve local governments' fiscal straits; and (5) establishing common definitions and compliance standards.¹⁸⁹ Arguably, the ACIR went well beyond these directives in recommending the repeal of seven existing federal mandates because they "do not have sufficient national interest to justify intruding on state and local government abilities to control their own affairs."¹⁹⁰ Nothing in the statutory directives instructed the ACIR to make general policy recommendations about federal mandates, though that is precisely what the ACIR did in its report.

Specifically, the ACIR identified what it considered to be "major problems common to most federal mandates" and recommended the following fixes:

- **Costs.** The federal government should assume some share of mandate costs, both to restrain the extent of the mandate and to help in identifying less-costly compliance alternatives.
- **Public accountability.** Federal laws should recognize that state and local governments are led by elected officials who are accountable to voters, just as the President and members of Congress are.
- **Citizen lawsuits.** Only the federal agency responsible for enforcement of a law should be permitted to sue state and local governments.
- **Small communities.** Deadlines should be extended and mandate requirements modified for very small local governments.
- **Lack of federal coordination.** A single federal agency should be designated to coordinate each mandate's implementation and to make binding decisions about that mandate.¹⁹¹

With these policy prescriptions, the ACIR appears to have changed from a government agency with a statutory mission into an interest group advocating further legislative action. The ACIR's policy prescriptions go well beyond compliance with the UMRA; in fact, the UMRA would have to be amended to implement them.

In addition to exceeding the UMRA's statutory mandate, the ACIR's recommendations went beyond its own staff's findings. For example, as already noted, the ACIR recommended that the federal government turn over to the states "full responsibility for safe drinking water standards."¹⁹² This goes well beyond the ACIR staff's recommendations which called for "national public health standards for drinking water," but state "imposition and implementation."¹⁹³ The Commission also went beyond its own staff's recommendations in urging that exemptions under the Endangered Species Act "be applied more extensively to minimize social and economic impact on state, local, and tribal governments."¹⁹⁴

It is important to remember that the ACIR itself conducted no reviews of federal mandates above and beyond its staff's working papers. By exceeding both its statutory mandate and its own staff's recommendations, the ACIR raises a serious question about its review process for existing federal mandates: to what extent are ACIR recommendations the products of thoughtful and honest review, rather than mere political advocacy?

In view of the intense criticism that met its draft recommendations, on July 9, 1996, the ACIR released a revised draft that reversed course on many of its original recommendations.¹⁹⁵ For example, where the initial draft recommendations had called on Congress to repeal intergovernmental mandates in the Family and Medical Leave Act, the revised draft recommended that Congress "[r]etain state and local government coverage under the Family and Medical Leave Act."¹⁹⁶ Where the initial draft recommended repeal of intergovernmental mandates found in the Occupational Safety and Health Act, the revised draft recommended "no change."¹⁹⁷ Despite these and other substantial revisions, on July 23, 1996, ACIR members voted thirteen to seven to reject the revised report and recommendations. At that point, ACIR executive director Bill Davis announced that the ACIR would "very likely not go back to the drawing board," but instead would seek direction from Congress on whether to proceed.¹⁹⁸ Congress responded by shutting down the ACIR on September 30, 1996.¹⁹⁹

D. THE UMRA BEGINS TO AFFECT THE LEGISLATIVE PROCESS

The UMRA took effect on January 1, 1996. Between January 1 and March 25, 1996, the CBO issued

twenty-six state and local government impact estimates and found five bills that contained public sector mandates, though none of them exceeded the \$50 million threshold to raise an UMRA point-of-order.²⁰⁰ According to Representative Rob Portman (R-Ohio), this indicates that the Act is working as intended, because mandate provisions are being excised before bills reach the floor precisely to avoid point-of-order votes.²⁰¹ As an example, he pointed to the Telecommunications Act of 1996, which initially included language to restrict the ability of state and local governments to control public rights-of-way held by cable companies. This restriction would have constituted an unfunded mandate potentially requiring a point-of-order vote because it would have imposed unfunded regulatory burdens on local governments in excess of \$50 million. But the mandate was removed from the bill before it ever reached the House floor. Opponents of the mandate persuaded the Commerce Committee to remove it from the bill, using the UMRA point-of-order vote as leverage,²⁰² and the Telecommunications Act was enacted without it.²⁰³ This episode suggests that the UMRA is not only informing legislators about unfunded mandates in legislative proposals, but is actually deterring them from enacting new unfunded mandates.²⁰⁴

Although Congress did not consider any legislation during the first half of 1996 that met the UMRA's \$50 million threshold for a point-of-order vote, UMRA procedures still figured prominently in committee and floor debates on legislative proposals. For example, on March 15, 1996, the House of Representatives debated and voted on House Resolution 375 to waive all points-of-order, including those under the UMRA, while it considered the Foreign Relations Authorization Act.²⁰⁵ Some House members objected to waiving the UMRA point-of-order, despite the fact that the CBO had concluded that the Act under consideration would impose no new intergovernmental mandates as defined by the UMRA. The House ultimately voted to waive the UMRA point-of-order, along with all other points-of-order.²⁰⁶ This episode suggests that Congress is quite sensitive about unfunded mandates, playing close attention to UMRA procedures even in cases where they clearly do not apply.

Despite the fact that no legislative proposals in the first half of 1996 met the UMRA's threshold \$50 million cost estimate, an UMRA point-of-order was raised on March 28, 1996, to force a vote on a motion to recommit the Contract With America Advancement Act of 1996.²⁰⁷ Representative David Bonior (D-Mich.) moved to recommit the bill to the House Ways and Means Committee with instructions to report the bill back to the House floor with an amendment making a provision of

the proposed legislation contingent on raising the minimum wage by a certain date. Bill Archer (R-Tex.) immediately raised a point-of-order under the UMRA, claiming that Bonior's motion to recommit included an unfunded mandate,²⁰⁸ and that the CBO had determined that raising the minimum wage would constitute an intergovernmental mandate costing more than \$50 million. However, the ranking minority member on the House Rules Committee, John Moakley (D-Mass.), quickly obtained a letter from the CBO certifying that neither the motion to recommit nor the proposed amendment would impose an intergovernmental mandate as defined in the UMRA because neither action would actually raise the minimum wage.²⁰⁹ To do that would require additional legislation. Unfortunately, the CBO letter arrived twenty minutes after debate on the measure had ended and the parties had voted, mostly along party lines, to support Representative Archer's point-of-order.²¹⁰

That did not stop Representative Moakley from excoriating the House leadership's use of UMRA procedures—the very first time they were applied on the House floor—“to stifle debate.”²¹¹ Moakley raised some ominous implications from the episode:

There is no parliamentary or budgetary ruling and there is no burden of proof on the member raising the point-of-order. It does not matter if the point-of-order is baseless, simply by raising the point-of-order, the House is required to vote on whether to consider the text that is challenged. A simple majority of the House, for any reason, regardless of whether there is any legitimate financial imposition or not, can deny the opportunity of a member to proceed with an otherwise germane and viable legislative measure. I raised the concern at that time that this could be used both to stop legislation not containing unfunded mandates from being considered on the floor and as a dilatory tactic to disrupt the legislative process. I was always assured that this would not be used for this purpose. Even then, however, I did not anticipate that the very first use of this tactic would be to deny the minority the right to offer an entirely legitimate and germane motion to recommit. . . .

I am deeply troubled that if this practice continues, it could simply become a backdoor approach used to gag legitimate debate. . . . The unfunded mandates law should be used as

a tool to fix legislation that imposes unfair financial burdens on state and local governments and the private sector. It should not be used as a weapon to prevent the consideration of viable and responsible legislation initiatives.²¹²

Representative Moakley's concerns were given credence when the House Parliamentarian, Charles W. Johnson, ruled that Representative Archer had "met the 'threshold burden to identify the specific language of the motion' that would be an unfunded mandate."²¹³ This ruling seems to confirm that all a legislator needs to do to stifle debate and force a vote is identify some specific language in legislation that *could* constitute an unfunded mandate.

Representative Moakley reiterated his concerns in a March 29th letter to Representative Gerald Solomon (R-N.Y.), Chair of the House Rules Committee.²¹⁴ In response, Representative Solomon suggested that it seemed clear from the minority debate at the time that Representative Bonior's motion to recommit included an unfunded mandate. And, had the motion itself not included an unfunded mandate, it surely would have required the enactment of an unfunded mandate to further the purposes of the Act under consideration. This, from Representative Solomon's point of view, justified raising an UMRA point of order against Representative Bonior's motion to recommit the Contract With America Advancement Act.²¹⁵ Representative Moakley disagreed. In a second letter, he reiterated that Representative Bonior's motion to recommit contained no unfunded mandate, so that the UMRA point of order technically was inappropriate.²¹⁶ Chairman Solomon responded, this time more constructively, by suggesting certain steps to avoid the future misuse of UMRA points of order to delay legislation or to block votes on legitimate amendments:

- "Members offering amendments with potential mandate implications" should "be prepared in advance to defend against mandate points-of-order;"
- Before offering such amendments or motions, Members should present written copies, along with evidence they do not include unfunded mandates, to "avoid triggering unnecessary points of order that otherwise must be raised defensively for lack of adequate time or information to make an informed judgment;"
- "[W]hen an unfunded mandate point of order is raised, Members on both sides" should "use the 20 minutes of debate allotted ... (to determine) whether

an unfunded mandate does exist;" and

- "[T]he Leadership on both sides (should) impress on their respective members, especially on . . . bill managers, that the point of order should not be raised for dilatory or frivolous purposes."²¹⁷

While Representative Solomon's recommendations, on one hand, may help to avert future controversies over the legitimate use of mandate points-of-order, they do not ensure that points-of-order cannot be used by the majority to stifle debate on proposed amendments and motions. On the other hand, the episode illustrates Congress's extreme sensitivity, at present, to the issue of unfunded mandates. This may or may not suggest that the UMRA is having the intended effect; it could just reflect the current anti-federal mood of the country.

It is true that Congress did not enact a single new unfunded intergovernmental mandate exceeding the \$50 million threshold during the 104th Congress. However, it is quite unlikely that the 104th Congress would intentionally have enacted substantial new unfunded mandates even if the UMRA did not exist. In short, it is difficult (if not impossible) to separate out the *legal* effects of the UMRA from the background political pressures which led to its enactment and continue to influence the legislative process. The UMRA does, nevertheless, provide some security against *unintentional* enactments of new unfunded mandates. That alone may justify the statute's existence.

IV. CONCLUSION: THE FUTURE OF UNFUNDED FEDERAL MANDATES

As a case study of the legislative process, the story of unfunded mandates reform is both troubling and reassuring. It is troubling in that it confirms suspicions that the legislative process is driven more by rhetoric and (mis)perception than by fact and evidence. It is reassuring in that it shows how even a faulty process can lead to good, or at least benign, legislative ends.

Federal mandate reform was based on unsubstantiated claims of "unfair" federal regulatory burdens that supposedly were driving state and local governments into "bankruptcy."²¹⁸ As we saw in Section I, the various state and local government surveys and studies of the federal mandates "problem" all failed to demonstrate that the federal government imposes net costs on state and local governments. On the contrary, the best available evidence indicates that state and local governments receive a net (after mandates) federal subsidy. Without other convincing reasons to either reduce federal mandates or increase federal funding,²¹⁹ legislative reform was unjustified or, at least,

unnecessary. This does not mean, however, that the UMRA is a bad law.

The UMRA increases the information available for legislative and administrative decisionmaking by requiring cost estimates for new mandates, and it enhances congressional accountability by requiring a separate recorded vote to approve new legislative mandates. These procedural requirements are useful, though not cheap. All other things being equal, they should improve the quality of legislative decisionmaking. Perhaps even more importantly, the UMRA changes the way administrative agencies do business. From now on, when agencies propose rules containing mandates with aggregate costs estimated at \$100 million or more in any one year, they must select the "least costly, most cost-effective or least burdensome alternative," unless that alternative is either contrary to law or demonstrably inappropriate.²²⁰

Some critics complain that the UMRA does not go far enough, however, in preventing Congress from imposing new unfunded intergovernmental mandates.²²¹ But that begs the question that we have tried to raise in this article: Why should the federal government prevent itself from imposing mandate costs on state and local governments, so long as it continues to provide them with a net subsidy? If there are sound arguments, beyond the unsubstantiated claims of fiscal unfairness, the advocates of federal mandate reform have not yet articulated them.²²²

Finally, the fight over federal mandates reflects fundamental questions about government policy and intergovernmental relations. One side alleges that the federal government has intruded too much on state sovereignty.²²³ The other side counters that the attack on unfunded federal mandates is really aimed at rolling back environmental and social programs.²²⁴ Both sides agree, however, that all levels of government today confront real and mounting fiscal pressures. The public continues to demand a wide range of expensive government services, but rejects tax increases to pay for them, and expects the government to balance its budget.²²⁵ The American economy, meanwhile, cannot grow fast enough to permit all three of these conditions to co-exist. Under the circumstances, and especially in view of the increasing pressure to reduce the federal budget deficit, the net federal subsidy to state and local governments is likely to decline, regardless of the Unfunded Mandates Reform Act of 1995.

NOTES

¹ *Federal Mandates; Passing the Buck*, ECONOMIST, Nov. 20, 1993, available in LEXIS, News library, Arcnws file. The various surveys and studies are discussed and critiqued *infra*

Section I.

² *Unfair Burden on Local Budgets*, WASH. POST, Oct. 24, 1993, available in LEXIS, News library, Arcnws file; William Tucker, *Cities Struggle with Costs, Frustrations of Unfunded Mandates*, AMER. BANKER WASH. WATCH, Nov. 1, 1993, available in LEXIS, News library, Arcnws file; Comments of Ohio Governor George Voinovich on *The MacNeil/Lehrer NewsHour* (PBS television broadcast, Jan. 5, 1995, transcript available in LEXIS, News library, Arcnws file) ("[W]hat they (Congress) want to do is shove the cost on the back of state and local governments, and they're bankrupting us.").

³ See, e.g., Christine Becker, 'No More Unfunded Mandates.' *Cities Broadcast Unified Message Coast to Coast*, NATION'S CITIES WKLY., Nov. 1, 1993, available in LEXIS, News library, Arcnws file.

⁴ Ray Archer, *Washington Buck-Passing Costing States, Cities, Taxpayers Dearly*, ARIZ. REPUBLIC, Nov. 1, 1993, available in LEXIS, News library, Arcnws file.

⁵ Paul C. Roberts, *Modern-Day Taxation Without Representation*, BUS. WK., Nov. 22, 1993, available in LEXIS, News library, Arcnews file.

⁶ *Unfunded Mandates: Issue Tops Senate Agenda, Dole Pledges*, GREENWIRE, Nov. 23, 1994, available in LEXIS, News library, Arcnws file.

⁷ *Government Operations, House GOP to Move Unfunded Mandates Apart from 'Contract' in Nod to Dole*, BNA DAILY REP. FOR EXEC., Nov. 20, 1994, available in LEXIS, News library, Curmws file.

⁸ Pub. L. No. 104-4, 109 Stat. 48 (codified at 2 U.S.C. §§ 658, 658a-g, 1501-1571 (1996)); *Unfunded Mandates: Clinton Signs Bill Curbing Requirements on States, Localities*, BNA NAT'L ENV'T DAILY, Mar. 23, 1995, available in LEXIS, News library, Curmws file.

⁹ The UMRA does, however, oblige the Advisory Commission on Intergovernmental Relations to review existing federal mandates and to report recommendations to Congress. 2 U.S.C. §§ 1551-1552 (1996). For a more extensive discussion of the Commission's responsibilities and the UMRA in general, see *infra* Section II.

¹⁰ 2 U.S.C. § 658d(a) (1996).

¹¹ *Id.* §§ 1531 & 1532 (1996). However, these cost estimates for private sector mandates are for information purposes only; Congress does not have to vote separately to approve substantial new private sector mandates.

¹² See *infra* Section I.

¹³ See, e.g., David A. Dana, *The Case for Unfunded Environmental Mandates*, 69 S. CAL. L. REV. 1 (1995); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux:*

Intergovernmental Immunity and the States as Agents of the Nation, 60 WASH. U. L.Q. 779 (1982); Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355 (1993).

14 Michael Fix & Daphne Kenyon, *Introduction*, in *COPING WITH MANDATES: WHAT ARE THE ALTERNATIVES* 1 (M. Fix and D.A. Kenyon eds., 1990).

15 ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *MANDATES: CASES IN STATE-LOCAL RELATIONS* 1 (1990)[hereinafter ACIR 1990].

16 See Sandra S. Osbourn, *Mandates and the Congress*, Congressional Research Service, Library of Congress 14 (Dec. 23, 1994).

17 ACIR 1990, *supra* note 15, at 1.

18 Fix & Kenyon, *supra* note 14, at 24.

19 *Id.*

20 Contrary to conventional wisdom, the situation has changed little to this day. Despite the proliferation of federal regulatory mandates since the 1960s and reductions in federal grant programs, state and local governments still appear to receive a sizable net subsidy from the federal government. Whether or not state and local governments *should* be subsidized at all by the federal government is a question somewhat outside the scope of this article. However, we touch on normative issues at various points *infra*.

21 CITY OF CHICAGO & ROOSEVELT UNIV., INSTITUTE FOR METROPOLITAN AFFAIRS, *PUTTING FEDERALISM TO WORK FOR AMERICA: TACKLING THE PROBLEMS OF UNFUNDED MANDATES AND BURDENSOME FEDERAL REGULATIONS* 8 (1992) [hereinafter CHICAGO STUDY].

22 See TIMOTHY J. CONLAN, *FEDERALLY INDUCED COSTS AFFECTING STATE AND LOCAL GOVERNMENTS* (1994) ("General Revenue Sharing (GRS) provided essentially no strings formula grants to virtually all state and local governments between 1972 and 1980, and to local governments until 1986. Although not designed originally to be a program of mandate reimbursement, and not distributed according to variations in mandated burdens, GRS distributed up to \$6 billion annually. GRS funds could be applied to mandated activities at the discretion of the recipient government. One study of federal mandates affecting local governments in the late 1970s found that the average costs of such requirements were roughly comparable to the amount of General Revenue Sharing the jurisdiction received.").

23 Kevin Eddins, *Two Studies Note Federal, State Aid to Cities Declined Over Decade; 1983-1993*, NATION'S CITIES WKLY., Sept. 20, 1993, available in LEXIS, News library, Arcnews file.

24 James Fosset, *The Politics of Dependence: Federal Aid to Big Cities*, in *THE CHANGING POLITICS OF FEDERAL GRANTS* 108, 108 (L.D. Brown et al. eds., 1984).

25 *Id.* at 121.

26 Roy Bahl et al., *Federal Policy and the Fiscal Outlook for Cities*, in *FISCAL CRISIS IN AMERICAN CITIES: THE FEDERAL RESPONSE* 3, 13 (L.K. Hubbell ed., 1979).

27 CHICAGO STUDY, *supra* note 21, at 9.

28 David A. Feller, *Private Enforcement of Federal Anti-Pollution Laws Through Citizen Suits: A Model*, 60 DENVER L.J. 553, 554 (1983); Wendy Naynerski & Tom Tietenberg, *Private Enforcement*, in *INNOVATION IN ENVIRONMENTAL POLICY* 109, 114 (T.H. Tietenberg ed., 1992).

29 Feller, *supra* note 28, at 554; Naynerski & Tietenberg, *supra* note 28, at 114.

30 U.S. GENERAL ACCOUNTING OFFICE, *WASTEWATER DISCHARGERS ARE NOT COMPLYING* 25 (1983).

31 See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *CHARACTERISTICS OF FEDERAL GRANTS-IN-AID PROGRAMS TO STATE AND LOCAL GOVERNMENTS: GRANTS FUNDED FY 1993*, at 1-2 (1994); see also Craig A. Rimmerman, *Reagan's New Federalism and the Implementation of Community Development Block Grants in a Midwestern City*, in *THE MIDWEST RESPONSE TO THE NEW FEDERALISM* 97, 99 (P.K. Eisinger & W. Gormley eds., 1988) (quoting a HUD official from Columbus, Ohio: "I liked the block grant until Reagan. The Reagan reforms have opened up the program to uncontrolled abuse by local governments. The eligibility requirements are so wide open now that you can use the funds for anything. This office no longer exercises control over the program. The monitoring of the program now takes place after the fact. It is a big city pork barrel program now under Reagan.").

32 Osbourn, *supra* note 16, at 1.

33 *Id.* at 8.

34 *Id.* at 5.

35 Thomas Muller & Michael Fix, *Government Regulation: Achieving Social and Economic Balance*, in 5 *SPECIAL STUDY ON ECONOMIC CHANGE* (1980).

36 Mary K. Falconer & Francis Berry, *Federal Mandates: Getting Beyond the Rhetoric*, SPECTRUM: J. STATE GOV'T (Spring 1995), at 21-22, available in LEXIS, News library, Curnws file.

37 See Muller & Fix, *supra* note 35; see also Falconer & Berry, *supra* note 36, at 21.

38 44 U.S.C. §§ 3501-3520 (1996).

39 5 U.S.C. §§ 602-612 (1996).

40 2 U.S.C. § 653 (1996).

41 *See id.*

42 *Id.*

43 STATE & LOCAL GOV'T COMM'N OF OHIO, AN OVERVIEW OF THE MANDATE PROBLEM AND RECOMMENDATIONS FOR OHIO (1988) [hereinafter 1988 OHIO STUDY].

44 *Id.*

45 Substitute S. 33, 120th General Assembly, *reprinted in* OHIO REV. CODE ANN. at 758 (Anderson Supp. 1994).

46 STATE & LOCAL GOV'T COMM'N OF OHIO, REGAINING CONTROL AT THE LOCAL LEVEL 11 (1994) [hereinafter 1994 OHIO STUDY].

47 *Id.*

48 *Id.*

49 *Id.*

50 A similar survey was conducted in Oklahoma in 1992. Like the Columbus, Ohio survey, the Oklahoma survey merely listed federal mandates identified as the "most burdensome" to local officials, without providing any financial information to substantiate the claims. OKLAHOMA STATE AGENCIES, COUNTIES AND CITIES AND TOWNS, STATE AND FEDERAL MANDATES AS PRESENTED TO THE ADVISORY COMMITTEE ON GOVERNMENTAL RELATIONS (1992).

51 1994 OHIO STUDY, *supra* note 46, at 22.

52 *Id.* at 17.

53 *See infra*, Section I.C.

54 The federal government provides many "discretionary funds" for state and local governments. In some cases, discretionary grants may have few or no strings attached. Typically, however, they are funds which state or local governments are free to use within certain parameters specified by federal law. For example, if the federal government provided discretionary funds for any purpose related to the implementation and enforcement of federal environmental laws, those funds obviously could not be used for non-environmental protection purposes; but they might be used to cover (indirectly) the costs of (directly) unfunded environmental mandates. In addition, as we point out *infra* note 77 and accompanying text, discretionary federal funds devoted to state or local projects are fungible; state and local governments are not out-of-pocket if they are forced to devote *saved* state and local funds on federal projects. However, depending on the circumstances, one may question why the federal government should fund local

programs while forcing local governments to devote local funds to federal programs.

55 U.S. DEP'T OF COMMERCE, FEDERAL EXPENDITURES BY STATE FOR FISCAL YEAR 1994, at 1 tbl.1 (1995) [hereinafter 1995 COMMERCE DEP'T REPORT]. Information regarding the amount of discretionary federal grants was provided by Lawrence W. Hush of the Office of Management and Budget. Letter from Lawrence W. Hush, Economist, Office of Management and Budget, to Carol Comer (Jan. 17, 1996) (on file with Professor Cole).

56 1994 OHIO STUDY, *supra* note 46, at 17.

57 CHICAGO STUDY, *supra* note 21.

58 *Id.* at 11.

59 *Id.* at 24.

60 *Id.* at iii.

61 *Id.* at 76.

62 STATE OF TENNESSEE, 1995-1996 BUDGET DOCUMENT, FEDERAL MANDATE COSTS AND FEDERAL AID TRENDS (1995).

63 This is clear from the report's definition of the phrase "federal mandates," which includes "provisions of federal law or regulation which require state government implementation, without option to the state." *Id.* at A-26. Neither this definition, nor any other reference in the report, distinguishes between funded and unfunded federal mandates.

64 *Id.* at A-25.

65 1995 COMMERCE DEP'T REPORT, *supra* note 55, at 1 tbl.1.

66 PRICE WATERHOUSE, IMPACT OF UNFUNDED FEDERAL MANDATES ON U.S. CITIES: A 314 CITY SURVEY (1993) [hereinafter U.S. CONF. OF MAYORS/PRICE WATERHOUSE SURVEY].

67 *Id.* at 2.

68 *See* DAVID KNOKE & GEORGE W. BOHRSTEDT, STATISTICS FOR SOCIAL DATA ANALYSIS 22 (1994).

69 *Id.* at 16.

70 U.S. CONF. OF MAYORS/PRICE WATERHOUSE SURVEY, *supra* note 66, at 1.

71 *Id.*

72 *Id.*

73 STAFF OF SENATE COMM. ON ENV'T & PUB. WORKS, ANALYSIS OF THE UNFUNDED MANDATES SURVEYS CONDUCTED BY THE U.S. CONFERENCE OF MAYORS AND THE NATIONAL

ASSOCIATION OF COUNTIES (1994).

74 *Id.* at 15-16.

75 *Id.* at 8-9.

76 *Id.* at 9.

77 *Id.* at Executive Summary.

78 *Id.*

79 *Id.*

80 *Id.* at 12.

81 *Id.* at 12-13.

82 *Unfunded Mandates: Baucus, Chafee Slam Mayors' Study as Methodologically Flawed, Inaccurate*, BNA STATE ENV'T DAILY, June 16, 1994, available in LEXIS, News library, Arcnews file.

83 42 U.S.C. §§ 300f-300j-26 (1996).

84 CONGRESSIONAL BUDGET OFFICE, THE SAFE DRINKING WATER ACT: A CASE STUDY OF AN UNFUNDED FEDERAL MANDATE 2 (1995).

85 *Id.* at 2, 10, 42.

86 Obviously this same analysis applies to other federal mandates designed to protect public health and safety. Even in the absence of federal mandates, local governments would likely incur some significant expenses to protect local populations from the harmful effects of air pollution, hazardous wastes, and other environmental hazards.

87 *See infra* Section I.B.

88 CHICAGO STUDY, *supra* note 21, at 10 (quoting Andrew J. Corwin, *How Federal Mandates Manhandle States*, CHI. TRIB., Sept. 9, 1992, available in LEXIS, News library, Arcnews file.) Neither the Chicago Report nor the Corwin article supply information on how the \$75 billion a year figure was derived. We are, however, willing to assume it is accurate for purposes of comparison against federal intergovernmental transfers.

89 In fact, unfunded federal mandates comprise only a small percentage of all federal mandates. For example, the U.S. Conference of Mayors/Price Waterhouse survey estimated that the total cost of unfunded federal mandates on cities in 1993 amounted to \$6.5 billion. U.S. CONF. OF MAYORS/PRICE WATERHOUSE SURVEY, *supra* note 66, at 2.

90 1995 COMMERCE DEP'T REPORT, *supra* note 55, at 1 tbl.1; Letter from Lawrence W. Hush, *supra* note 55.

91 DAVID N. HYMAN, PUBLIC FINANCE: A CONTEMPORARY APPLICATION OF THEORY TO POLICY 649 (1990); *see also* JOHN

E. DAWSON & PETER J.E. STAN, PUBLIC EXPENDITURES IN THE UNITED STATES: 1952-1993, at 62, 72 (1995) ("It is frequently assumed that a federal grant causes additional state and local expenditures and that these expenditures occur in the program, or for the purpose, the grant specifies. Neither part of this assumption need hold in a specific instance, however, since grants are fungible against state and local funds in the jurisdictions' regular budgets This fungibility of federal grants allows state and local governments to substitute across categories of expenditures and thus casts doubt on any accounting of the final ends of federal grants."); Linda Feldman, *Federal Block Grants: Boondoggle or Boon for Local Government?*, CHRISTIAN SCI. MONITOR, Feb. 15, 1995, available in LEXIS, News library, Cumws file ("The term block grant, in fact, can be so wide as to be almost meaningless.").

92 *See* CONLAN, *supra* note 22.

93 U.S. CONF. OF MAYORS/PRICE WATERHOUSE SURVEY, *supra* note 66, at 2; *see also* William Tucker, *Cities Struggle with Costs, Frustrations of Unfunded Mandates*, AM. BANKER WASH. WATCH, Nov. 1, 1993, available in LEXIS, News library, Arcnews file.

94 *See* S. REP. NO. 1, 104th Cong., 1st Sess. 7 (1995), reprinted in 1995 U.S.C.C.A.N. 4, 10; *see also* *Recent Legislation: Federalism — Intergovernmental Relations — Congress Requires a Separate, Recorded Vote for any Provision Establishing an Unfunded Mandate. — Unfunded Mandates Reform Act of 1995*, Pub. L. No. 104-4, 109 Stat. 48, 109 HARV. L. REV. 1469, 1469 n. 2 (1996) [hereinafter *Recent Legislation*].

95 ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, CHARACTERISTICS OF FEDERAL GRANT-IN-AID PROGRAMS TO STATE AND LOCAL GOVERNMENTS: GRANTS FUNDED FY 1993, at 7 tbl.2 (1994).

96 *Recent Legislation*, *supra* note 94, at 1469 n. 2 (1996).

97 *Id.*; *see also* WILLIAM D. ANDREWS, BASIC FEDERAL INCOME TAXATION 38 (4th ed. Supp. 1994).

98 *See supra* note 88 and accompanying text.

99 26 U.S.C. § 164(a) (1996).

100 James R. St. George, *Unfunded Mandates*, 13 BROOKINGS REV. 12, 14 (1995).

101 *Id.*

102 *Supra* note 13 and accompanying text.

103 Many of these arguments are made persuasively by Dana, *supra* note 13. For an explanation of the economic efficiency gains that can result from unfunded mandates, *see* HYMAN, *supra* note 91, at 659-60 (showing that federal mandates for local pollution abatement, which impose 80% of the compliance costs on local communities, can "get local residents to choose the efficient level of abatement").

104 See, e.g., CHICAGO STUDY, *supra* note 21, at 11.

105 See *id.* at 9.

106 ANITA S. HARBERT, FEDERAL GRANTS-IN-AID: MAXIMIZING BENEFITS TO THE STATES 35 (1976).

107 See Michael S. Hamilton, *Intergovernmental Regulation*, PUB. ADMIN. REV., May-June 1995, at 301.

108 854 F. Supp. 1503 (D. Mont. 1994), *cert. granted*, 116 S.Ct. 2521 (1996) (Nos. 95-1478, 95-1503).

109 18 U.S.C. § 922(s) (1996).

110 854 F. Supp. at 1519.

111 *Id.* at 1515, 1517.

112 During the 1960s and 1970s, the Federal Law Enforcement Assistance Administration "gave away billions of federal dollars in crime-fighting grants that had few strings attached." *Federal Crime Bills: The Gift That Keeps on Giving*, TIME, Feb. 27, 1995, at 12. That program was axed in 1982, but the federal government continues to fund local law enforcement. In fiscal year 1995, just one direct federal grant program to law enforcement, the "COPS Universal Hiring Program," provided a total of up to \$120 million to state and local jurisdictions to add new police officers. Federal funds covered up to 75% of the total salary and benefits of each new officer hired for three years, to a maximum of \$75,000 per officer. Officers hired under this grant program were not required to work full- or even part-time on federally mandated programs; they could be devoted 100% to local priorities.

113 856 F. Supp. 1372 (D. Ariz. 1994).

114 Mack v. United States, 66 F.3d 1025 (9th Cir. 1995).

115 *Id.* at 1034 (Fernandez, J., dissenting).

116 Quoted in *Handguns: Authority to Require State Officials to Make Background Checks of Handgun Buyers Argued*, 65 U.S.L.W. 3426 (U.S. Dec. 20, 1996).

117 2 U.S.C. § 1513 (1996).

118 *Id.*

119 We could find no confirmation of this implication in any of the committee reports or floor debates on the UMRA. Oddly, the Senate findings are not addressed anywhere other than in the statute itself. The House bill included no specific findings with respect to unfunded mandates. See CONF. REP. ON S.1, UNFUNDED MANDATES REFORM ACT OF 1995, 104TH CONG., 1ST SESS., reprinted in 141 CONG. REC. H3053, H3062 (1996). Some comments by individual legislators during floor debates were, however, contrary to the Senate Findings. For example, Representative Thomas Davis III (R-Va.) stated during floor debates on the House bill that "during the past decade, unfunded

Federal mandates have literally grown out of control, and today counties are spending more of their locally raised revenues to comply with these mandates than they receive in Federal aid." 141 CONG. REC. H3303, H3309. Representative Davis's statement appears to contradict our findings in Section I, but he neither provided nor referred to any data in support of his conclusion.

120 2 U.S.C. § 1501(2) (1996).

121 COMM'N ON GOV'T REFORM AND OVERSIGHT, CONF. REPORT ON THE UNFUNDED MANDATE REFORM ACT, H.R. 5, H.R. REP. NO.104-1, 104th Cong., 1st Sess., pt.2 (1995), available in LEXIS, Genfed library, Cmtrpt file.

122 2 U.S.C. § 658b (1996).

123 *Id.* § 658b(d).

124 *Id.* § 658c. It is important to bear in mind, however, that private sector mandates, unlike intergovernmental mandates, are not subject to point-of-order votes under the UMRA.

125 *Id.* § 658d.

126 *Id.* §§ 658d(c)(2) & 658e.

127 *Id.* § 658a.

128 *Id.* § 658a(6).

129 *Id.* § 1532.

130 *Id.*

131 *Id.* § 1532(a)(1).

132 *Id.* § 1532(b).

133 *Id.* § 1532(a)(3) & (4).

134 *Id.* § 1532(a)(2).

135 *Id.* § 1535.

136 *Id.* § 1551.

137 *Id.* § 1552.

138 *Id.* § 1552(a)(3).

139 *Id.* § 1554.

140 *Id.* § 1571. The ACIR's initial report and recommendations on existing unfunded mandates is discussed *infra* Sec. III.B.

141 2 U.S.C. § 1571(a)(3).

142 *Id.* § 1571(b).

143 See *Recent Legislation*, *supra* note 94, at 1469.

144 Stephen E. Winn, *Mandates Placebo*, KAN. CITY STAR, Jan. 31, 1995, at B4 (Metropolitan).

145 Nelson Lund, *The Mandate Hoax of 1995. Unfunded Mandate Reform Act of 1995*, NAT'L REV., Nov. 27, 1995, at 52.

146 See, e.g., Denise Baker, *NLC President Calls on Washington to Step Up to Challenges: "It is Time for the Federal Government to Work with Us."* National League of Cities' 1996 Congressional City Conference; Includes Related Transcript of the 1996 Action Agenda, NATION'S CITIES WKLY., Mar. 18, 1996, at 12, available in LEXIS, News library, Arcnws file.

147 Before the Senate Appropriations Committee, Legislative Branch Subcommittee, Fed. News Service, May 23, 1996, (statement of June E. O'Neill, Director, Congressional Budget Office) [hereinafter Statement of June E. O'Neill].

148 *Id.*; see also Report from the Congressional Budget Office on Unfunded Federal Mandates, 142 CONG. REC. H1278, H1279 (Feb. 27, 1996).

149 *Government Operations: Federal Officials Ask for State Help in Collecting Unfunded Mandates Data*, BNA MANAGEMENT BRIEFING, July 20, 1995, available in WL, BNA-BMB database, 7/20/95 BMB d3.

150 See *supra* notes 83-84 and accompanying text.

151 *Id.*

152 Statement of June E. O'Neill, *supra* note 147.

153 *Id.* A few of CBO's mandate cost estimates are discussed *infra* this section.

154 The ACIR is supposed to have 26 members, but at the time it released its report, there were four vacancies. See CITIZENS FOR SENSIBLE SAFEGUARDS, SHIRKING RESPONSIBILITY: ACIR'S CALL TO REPEAL FEDERAL PROTECTIONS 25 (1996) [hereinafter CSS REPORT].

155 ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF FEDERAL MANDATES IN INTERGOVERNMENTAL RELATIONS (1996) [hereinafter ACIR REVIEW AND RECOMMENDATIONS].

156 29 U.S.C. §§ 201 *et seq.* (1996). This law establishes minimum standards for wages, overtime compensation, equal pay, recordkeeping, and child labor, including standards for public sector employees.

157 29 U.S.C. §§ 2601 *et seq.* (1996). This law requires employers, including state and local governments, to provide employees with up to 12 weeks of unpaid leave each year to care for a newborn child, newly-adopted child, or newly-placed foster child, or to care for a seriously ill child, parent, or spouse. The Act requires the extension of medical insurance benefits during the leave period.

158 29 U.S.C. §§ 651-678 (1996). OSHA authorizes the Department of Labor to set standards for workplace health and safety for private employers. It only applies to state governments that volunteer to administer the federal OSHA program within their jurisdictions.

159 Under Title V of the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102-143, 105 Stat. 952, the U.S. Dept. of Transportation administers drug and alcohol testing regulations that apply to holders of commercial drivers licenses, including state and local government employees.

160 Under regulations promulgated by the Department of Transportation pursuant to the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. §§ 2901-2906 (1996), state and local governments must convert to the metric system for local construction plans and specifications by Oct. 1, 1996.

161 42 U.S.C. § 1396a(a)(13)(A) (1996). The Boren Amendment to Medicaid requires states to establish reimbursement rates to pay hospitals, nursing facilities, and intermediate care facilities for services provided to persons eligible for Medicaid assistance.

162 This requirement was enacted in § 1038(d) of the Intermodal Surface Transportation Efficiency Act of 1991, 23 U.S.C. § 109(d) (1996). It was, in fact, repealed months before the Commission issued its review and recommendation by the National Highway System Designation Act of 1995, Pub. L. No. 104-59, 109 Stat. 568, section 205(b).

163 ACIR REVIEW AND RECOMMENDATIONS, *supra* note 155, at 5.

164 33 U.S.C. §§ 1251-1387 (1996). The Clean Water Act requires states to designate water uses, develop water quality criteria, monitor water quality, and report on water quality every two years. Local governments are required to develop programs for controlling pollution from nonpoint sources, to control discharges from storm sewers, and to comply with federal standards in treating sewage flowing into publicly-owned treatment works.

165 Pub. L. 101-476. This law reauthorizes discretionary programs that provide support and research to aid in the education of disabled individuals.

166 Pub. L. 101-336. This law prohibits discrimination against the disabled in employment, public services, and public accommodations. State and local governments are required to adjust their policies to comply with the Act, and to make structural changes to public buildings and streets to provide access to the disabled.

167 ACIR REVIEW AND RECOMMENDATIONS, *supra* note 155, at 6.

168 42 U.S.C. §§ 300f-300j-26 (1996). This law sets national drinking water standards for the 58,530 waterworks around the

country that serve 25 or more persons.

169 16 U.S.C. §§ 1531-1544 (1996). This law prevents economic development in areas where endangered species are known to be present. In addition, state, local, and tribal governments cannot obtain federal permits, licenses, or grants if the project does not comply with national requirements for protecting endangered species.

170 42 U.S.C. §§ 7401-7671q (1996). This law requires states to obtain federal approval of state plans for achieving federally established air quality standards. Emissions standards in the Act in some cases apply to facilities owned by local governments. In addition, local development is conditioned on compliance with federal air pollution rules.

171 40 U.S.C. §§ 276a-277 (1996). About 60 federal laws make compliance with the Davis-Bacon Act a condition for obtaining federal grants-in-aid. The Davis-Bacon Act requires certain terms for federal construction, alteration, and repair contracts worth more than \$2000, including minimum wage schedules.

172 ACIR REVIEW AND RECOMMENDATIONS, *supra* note 155, at 6.

173 *Id.* at 13.

174 *Quoted in id.*

175 See, e.g., Amy B. Resnick, *Mandate Reform Sponsor: Law Works, But Older Unfunded Mandates Persist*, BOND BUYER, Mar. 25, 1996, (comments of Rep. Donald M. Payne, D-N.J.), available in LEXIS, News library, Arcnws file.

176 CSS's members include (among others) the AFL-CIO, the American Association of University Professors, the American Jewish Committee, the American Lung Association, the Children's Defense Fund, the Environmental Defense Fund, Greenpeace, the International Association of Firefighters, the NAACP, the National Audubon Society, the National Consumers League, the National Education Association, the National Urban League, the Natural Resources Defense Council, OMB Watch, the Sierra Club, the United Cerebral Palsy Associations, and the United Methodist Church General Board of Church and Society.

177 CSS REPORT, *supra* note 154.

178 *Id.* at 3, 11.

179 *Id.* at 12-15; see also ACIR Recommendations 'Dire' Threat to State, Local Workers, Coalition Says, BNA MGMT. BRIEFING, Mar. 11, 1996, available in WL, BNA-BMB database, 3/11/96 BMB d4 [hereinafter ACIR Recommendations 'Dire' Threat].

180 Advocacy Coalition Issues Critique Attacking ACIR Recommendations, AIR/WATER POLLUTION REP.'S ENV'T. WK., Mar. 15, 1996, available in LEXIS, News library, Arcnws file.

181 *Quoted in* CSS REPORT, *supra* note 154, at 6.

182 *Id.*

183 *Id.*

184 Imtiaz A. Khan, *Review of the Unfunded Mandates Reform Act of 1995*, FDCH CONG. HEARINGS SUMMARIES, Mar. 22, 1996, available in LEXIS, News library, Arcnws file.

185 2 U.S.C. § 1552(c)(2).

186 ACIR Recommendations 'Dire' Threat, *supra* note 179, at *4.

187 *Id.*; see also 67 Fed. Reg. 7271.

188 U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF FED. MANDATES IN INTERGOVERNMENTAL REL., AN ACIR REP. BASED ON SEC. 302 PUB. L. NO. 104-4, DRAFT FOR DISCUSSION AT JULY 23, 1996 COMM'N MEETING (1996) [hereinafter ACIR REVISED REVIEW AND RECOMMENDATIONS].

189 See *supra* note 137 and accompanying text.

190 See *supra* notes 156-164 and accompanying text.

191 ACIR REVIEW AND RECOMMENDATIONS, *supra* note 155, at 4-5; see also Jeff Fletcher, *Mandate Madness Unjustified, Commission Says. Includes Related Article on Advisory Commission on Intergovernmental Relations Conference, and Related Information on Mandate Problems*, NATION'S CITIES WKLY., Jan. 22, 1996, available in LEXIS, News library, Curnws file.

192 ACIR REVIEW AND RECOMMENDATIONS, *supra* note 155, at 13.

193 *Id.* at A-30

194 *Id.* at 14.

195 ACIR REVISED REVIEW AND RECOMMENDATIONS, *supra* note 188.

196 *Id.* at 10.

197 *Id.* at 12.

198 *Unfunded Mandates: ACIR Votes Down Revised Draft of Report on Unfunded Mandates, Ponders Next Step*, BNA NAT'L ENV'T DAILY, July 30, 1996, available in WL, BNA-NED database, 7/30/96 NED d9.

199 It is unclear, however, whether Congress has terminated or just temporarily inactivated the Commission. See Dennis Camire, *Go Figure: Congress Keeps Alive Commission It Killed*, GANNETT NEWS SERV., Nov. 27, 1996, available in LEXIS, News library, Curnws file.

200 Resnick, *supra* note 175.

201 *Id.*

202 See *Hearings on the First Year of the UMRA of 1995 Before the House Gov't Reform and Oversight Committee, Human Resources and Intergovernmental Rel. Subcom.*, 104th Cong. (Mar. 22 1996) (statement of Rep. Rob Portman, R-OH).

203 Pub. L. No. 104-104.

204 However, this deterrent effect is not complete. The very same Telecommunications Act of 1996, for example, includes a significant unfunded mandate that was not subject to a point-of-order vote because it came in below the \$50 million threshold. Specifically, section 602 of the Act exempts direct broadcast service providers "from the collection or remittance, or both of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service." *Id.* § 602(a). Even though this unfunded federal restriction on local taxing power did not meet the UMRA's threshold for a point-of-order vote, it could cost local governments millions of dollars in lost revenues. See Barrie Tabin & Nicholas P. Miller, *The Federal Telecommunications Act of 1996: What It Means for Cities*, NATION'S CITIES WKLY., Feb. 12, 1996, available in LEXIS, News library, Arcnws file.

205 H.R. 1561, 104th Cong. (1996).

206 142 CONG. REC. H2075, H2081-2082 (1996).

207 H.R. 3136, 104th Cong. (1996).

208 142 CONG. REC. H2987-01, H3019 (1996).

209 *Id.* at H3025.

210 See Damon Chappie, *Parliamentary Tussle Over 'Unfunded Mandate,'* ROLL CALL, Apr. 4, 1996, available in LEXIS, News library, Arcnws file.

211 *Id.*

212 142 CONG. REC. H3025-26.

213 Chappie, *supra* note 210.

214 John Moakley, *Point-of-Order*, CONG. PRESS RELEASES, Mar. 29, 1996, available in LEXIS, News library, Arcnws file.

215 In support of this contention, Rep. Solomon later sought and received from CBO Director June E. O'Neill confirmation that raising the minimum wage in order to effectuate regulatory reform, as would have been required by Representative Bonior's motion to recommit, would have constituted an unfunded mandate under UMRA. See Gerald Solomon, *Act of 1938*, CONG. PRESS RELEASES, Apr. 11, 1996, available in LEXIS, News library, Arcnws file; Gerald Solomon, *Letter to Rep. Moakley Re: Minimum Wage Legislation*, CONG. PRESS RELEASES, May 7, 1996, available in LEXIS, News library,

Arcnws file.

216 John Moakley, *Point-of-Order*, CONG. PRESS RELEASES, Apr. 3, 1996, available in LEXIS, News library, Arcnws file.

217 Gerald Solomon, *Point-of-Order*, CONG. PRESS RELEASES, Apr. 10, 1996, available in LEXIS, News library, Arcnws file.

218 See *supra* note 2 and accompanying text.

219 We are not arguing that there are no good reasons for reducing federal mandates or increasing federal funding; we are only arguing that the arguments made, so far, by state and local government proponents of federal mandate relief are *not* convincing.

220 See *supra* note 135 and accompanying text. On the potential significance of this limitation on administrative rulemaking, see Cass Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 272-73 (1996).

221 See, e.g., Lund, *supra* note 145.

222 But see Dean Stansel, *A Taxing Problem for U.S. Cities*, CHI. TRIB., Oct. 27, 1993, available in LEXIS, News library, Arcnws file (articulating a more plausible fiscal argument against both federal mandates and federal grants, based on the allegedly unnecessary or unwarranted costs of funneling tax dollars through Washington and then back to state and local governments).

223 See, e.g., CHICAGO STUDY, *supra* note 21, at 24.

224 See, e.g., *Hearings on Unfunded Federal Mandates Before the Subcomm. on Investigations and Oversight of the House Comm. on Sciences, Space and Technology*, 102d Cong. (1994) (statement of Robert Adler, Senior Attorney, Natural Resources Defense Council, Inc.).

225 Accord Iris J. Lav and James R. St. George, *Will Curbs on Unfunded Mandates Protect States From the Impact of a Federal Balanced Budget Amendment? A New Agenda — Old Constraints*, 48 NAT'L TAX J. 337 (1995).

